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IN THE
COURT OF APPEALS OF INDIANA

MYRON HOTTELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A01-0709-CR-440
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0202-FB-187

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Myron Hottell appeals the trial court's revocation of his probation and order that he serve his previously suspended sentence. Hottell raises two issues for our review, which we restate as follows:

1. Whether the trial court abused its discretion in revoking Hottell's probation after considering hearsay evidence.

2. Whether the court abused its discretion in ordering Hottell to serve his entire suspended sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

In late 2002, Hottell drove a motorcycle while intoxicated. His girlfriend was a passenger. Hottell wrecked the motorcycle, and his girlfriend died from the resulting injuries, leaving behind three minor children. On January 15, 2003, Hottell pleaded guilty to Reckless Homicide, a Class C felony. And on March 5, 2003, the trial court sentenced Hottell to six years, with three years suspended to probation.

After serving his jail time, Hottell enrolled in the Aviation Institute of Maintenance in Indianapolis. While Hottell was at that school one day, someone in a stolen vehicle hit him. Hottell suffered severe brain trauma and was in a coma for a week. Although Hottell underwent extensive rehabilitation, received his diploma, and was certified by the Federal Aviation Administration, he continues to have severe memory problems.

With three months remaining on his three-year term of probation, Hottell was arrested in Morgan County on two charges of driving with a suspended license, Class A

misdemeanors, and public intoxication, a Class B misdemeanor. Subsequently, on May 11, 2007, the State filed a petition to revoke Hottell's probation, which alleged that Hottell had committed those offenses and had also consumed alcohol in violation of the conditions of his probation.

The trial court held a hearing on the State's motion on August 15, 2007. At that hearing, Hottell attempted to admit the State's allegations, but had difficulty recalling relevant facts. In particular, the following exchange took place:

> THE COURT: Is there an admission or is there a hearing?
>
> MR. HAVERSTOCK [for Hottell]: There is going to be an admission, Judge, and we're go[ing to] argue the appropriate punishment.
>
> * * *
>
> THE COURT: Your lawyer says that you're going to admit to certain things and I'm go[ing to] decide the sentence. Is that your understanding?
>
> [HOTTELL]: It is.
>
> * * *
>
> THE COURT: All right. And did you violate your probation in any particular way, Mr. Hottell?
>
> [HOTTELL]: Yes.
>
> THE COURT: And how did you violate your probation?
>
> [HOTTELL]: Consumed alcohol on or around, uh, May first.
>
> THE COURT: Is that it?
>
> MR. HAVERSTOCK: Judge, Mr. Hottell has pled guilty to something in Morgan County. He does not know what. I have tried to get records from Morgan County. They were very uncooperative. The only thing we know is he was charged with a crime and he paid a hundred and seventy-five

dollars so we're assuming that he pled to either a driving while suspended charge or something in here. He does not . . . He doesn't know but the admission of using alcohol alone, I believe, would violate his probation.

THE COURT: Of course it would but it would be important to me to know whether or not he was driving.

Does the State have any information, or the probation office?

* * *

MR. SKAGGS [for the probation office]: Yes, Judge. On all the information I had they also included that the fine was based on driving while suspended as a misdemeanor.

* * *

MR. HAVERSTOCK: I . . . I have that, Judge. And I would agree that that's what it appears and, like I said, Mr. Hottell is not for sure. There . . . I would say there's a high probability of [sic] that is what happened but . . .

THE COURT: This is an important matter . . . . If there's not an agreement on that then I think that somebody ought to find out . . . . It obviously makes a difference to the Court because it's more serious if somebody was on probation for killing somebody and they weren't even supposed to be driving and then they were driving.

MR. HAVERSTOCK: Mr. Hottell was driving his automobile.

THE COURT: Okay. Mr. Hottell, did you also commit the offense of driving while suspended in Morgan County [on] May the first, 2007?

[HOTTELL]: Apparently I did.

THE COURT: If you're hedging forget about any of it.

[HOTTELL]: Yes I did.

THE COURT: Now is there some reason why you're doubting that or you just trying to hedge to keep your options open on appeal?

* * *

[HOTTELL]: No.

* * *

THE COURT: Okay. Do you remember getting arrested up in Morgan County?

[HOTTELL]: I don't want to get . . . smart . . . Judge[.] I don't remember because I was in a wreck and I hurt my brain. I don't have much of a memory for things like that.

* * *

THE COURT: . . . I think it would be appropriate since there's some question . . . for the State to simply call the probation officer.

* * *

[Direct examination of Mr. Skaggs by Ms. Wheatley]

Q: Do you have information that Mr. Hottell has violated his probation?

A: Yes I do. Uh . . . We received information and I believe it was from [Hottell] that he had been arrested in Morgan County. We contacted Morgan County and we found out that he was arrested on May first for driving while suspended, a misdemeanor, and public intoxication as a B misdemeanor.

Q: And, uh, you've received copies of the probable cause and the charging informations, correct?

A: Yes I have.

Q: And, uh, in the probable cause did it allege the defendant had been drinking?

A: Yes it did.

Q: And did it also allege that he had been driving?

A: Yes it did.

Q: And did it also allege that he had been . . . that his license was suspended?

A: Yes it did.

Q: Uh, did you also receive information that the defendant had pled guilty to one of those crimes charged?

A: Yes.

Q: And what was that?

A: It appears that it was driving while suspended and he paid a fine. . . .

THE COURT: But the information you have is that he was . . . that he pled guilty to driving while suspended?

MR. SKAGGS: Yes.

* * *

THE COURT: Okay. Now let me just ask this simple . . . maybe this is a simple question . . . . Does the defendant, Mr. Haverstock, dispute what appears to be so far the uncontroverted evidence that he committed the offense of driving while suspended and that he was consuming alcohol?

MR. HAVERSTOCK: No.

* * *

THE COURT: He doesn't dispute that?

MR. HAVERSTOCK: He does not dispute it. . . .

Transcript at 110-120. Following the presentation of evidence, the court found that Hottell had violated the conditions of his probation, which the court then revoked.

Thereafter, the court ordered Hottell's full three-year suspended sentence to be executed. In doing so, the court stated as follows:

[W]hen you were placed on probation . . . at the time of the sentencing, you were given . . . an opportunity[.] I think I probably said to the family, I remember sitting here listening through this, looking at this picture, looking

at the paperwork in your file. It reminds me of that hearing some years ago. . . . I remember her parents coming in this courtroom and they wanted you to go to prison . . . . I suspect I probably told them something along the lines that it was important to try to not only punish you but also to rehabilitate you.

I also do not doubt or dispute the evidence that you submitted which shows that you have made considerable efforts towards your rehabilitation. It sounds like . . . you . . . have had a difficult time of it with somebody nearly killing you in an accident. And [it] sounds like you have made some really serious effort at rehabilitation . . . concerning the vocational programming and so forth. . . .

Well there's no doubt you've been through a lot. But you're not on probation for driving while suspended. You're not on probation for drunken driving, or possession of marijuana, or . . . theft, or some minor offense. Somebody died here. And . . . I gave you your second chance when I gave you three years of probation. I suspended half of that time.

And . . . the difficulty for me is that there's one thing . . . that none of those things, none of which I doubt, can overcome. And [i]t sounds like also you, like your lawyer said with many alcoholics, you've had some relapses. But you were not even supposed to be drinking, which would have been one thing. But you certainly weren't supposed to be driving. . . . And it sounds like you were drinking that day and you were driving.

And it may not have been the last time that you drove. Maybe you drove more than one time while you were drinking between the time when you were responsible for Ms. Lowe's death and the time that you were driving and drinking on May the first, 2007. Maybe it was only the first time or maybe there was another one. But the problem is that you have demonstrated by your actions that you are a danger to other people.

It's not an insignificant matter. It's extremely significant. Another life is an extremely significant matter. . . .

Now that's the thing that none of this in my mind overcomes is the danger you present to society.

* * *

When somebody is on probation for a very serious case then if they violate their probation in a serious way then I'm going to take it serious and impose a serious consequence.

And it doesn't get much more serious than when somebody loses their life and you're responsible for it. And you've demonstrated by your previous actions[] that your actions can cost somebody their life. And the very kind of thing that you did to cause someone to lose their life[; it]

> sounds like, based on the evidence, that that's exactly what you have done while you were on probation for causing the death of another person.

Id. at 159-63. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Hottell asserts that the trial court abused its discretion when it revoked his probation and ordered him to serve his three-year suspended sentence. We review a trial court's decision to revoke probation under an abuse of discretion standard. Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005), trans. denied. A probation revocation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999).

We will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Id. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id. The violation of a single condition of probation is sufficient to revoke probation. Wilson v. State, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a "matter of grace" and a "conditional liberty that is a favor, not a right." Jones, 838 N.E.2d at 1148.

Here, Hottell first asserts that the trial court abused its discretion when it revoked his probation based on hearsay evidence that Hottell had committed criminal acts while

on probation.[1] Hottell also argues that "the full revocation of [his] sentence [was] unreasonable." Appellant's Brief at 5. We address each argument in turn.

Issue One: Hearsay Evidence

Hottell contends that the trial court erred in revoking his probation when the only evidence that he committed an additional crime was hearsay testimony. In particular, Hottell now argues that the testimony of his probation officer, Skaggs, constituted double hearsay as it was based on the allegations underlying his arrest in Morgan County. The State responds by noting that the hearsay testimony was substantially trustworthy. We agree with the State.

Waiver

As an initial matter, we note that Hottell's trial counsel did not object to Skaggs' testimony at trial. Indeed, not only did Hottell's counsel not object to or otherwise contest that testimony, Hottell and his counsel were largely complicit in establishing the fact that Hottell had been arrested in Morgan County for driving while suspended. Normally, such circumstances amount to waiver of the issue for appellate review. See, e.g., Johnson v. State, 725 N.E.2d 864, 867 (Ind. 2000). However, a defendant may avoid waiver of an issue if the error is fundamental. See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

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[1] We note that Hottell admitted consuming alcohol in violation of his probation. Usually, such an admission is sufficient to justify the court's revocation of probation. See Wilson, 708 N.E.2d at 34. Here, however, the trial court substantially relied on the allegation that Hottell committed an additional crime as its basis for both revoking Hottell's probation and ordering him to serve his entire suspended sentence. Accordingly, we likewise do not rely solely on the fact that Hottell admitted consuming alcohol in violation of the terms of his probation.

We recently discussed the fundamental error doctrine in a similar context as follows:

> Fundamental error is error that constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006). The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Ritchie v. State, 809 N.E.2d 258, 273 (Ind. 2004), reh'g denied. Although the evidentiary rules are relaxed in probation revocation proceedings, defendants still have due process rights.

Carden v. State, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). In Carden, we held that where the only evidence presented by the State in a probation revocation proceeding was unreliable hearsay testimony, the error was so prejudicial that it denied the defendant a fair trial. However, in order for the fundamental error rule to apply, there must, in fact, have been an error. See id. As such, we turn to the merits of Hottell's appeal.

Substantial Trustworthiness

Again, there is no right to probation. Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007). The trial court has discretion whether to grant it, under what conditions, and whether to revoke it if conditions are violated. Id. "It should not surprise, then, that probationers do not receive the same constitutional rights that defendants receive at trial." Id. However, "[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing." Id. at 440

In Reyes, our Supreme Court held that the "substantial trustworthiness test" applies in determining the admissibility of hearsay evidence in probation revocation

hearings. Id. at 439. Quoting the United States Court of Appeals for the Seventh Circuit, the court noted that

> ideally [the trial court should explain] on the record why the hearsay [is] reliable and why that reliability [is] substantial enough to supply good cause for not producing . . . live witnesses. If the test of substantial trustworthiness of hearsay evidence is met, a finding of good cause has also implicitly been made.

Id. at 442 (quoting United States v. Kelley, 446 F.3d 688, 693 (7th Cir. 2006)) (alterations in original).

Here, the trial court did not explicitly state on the record why the hearsay evidence it relied upon—Skaggs' testimony regarding the contents of the Morgan County probable cause affidavit, charging information, and guilty plea (collectively, the "Morgan County documents")—was substantially reliable. But that does not mean that that evidence lacked trustworthiness. Indeed, there were a number of independent sources confirming what happened in Morgan County. While Hottell could not recall what charge he had specifically pleaded guilty to, he did recall that all of the following occurred on or around May 1, 2007, in Morgan County: (1) that he had been drinking; (2) that his father had picked him up from a police station; (3) that he had pleaded guilty to a charge; and (5) that he had paid a fine as a result of his pleading guilty. Hottell's former wife also testified that Hottell had informed her that he had been arrested in Morgan County. Finally, Skaggs testified that he had been informed of Hottell's Morgan County arrest by Hottell, and shortly thereafter Skaggs contacted Morgan County and obtained the documents in question.

All of those facts supported an inference of reliability in the Morgan County documents, which supplied the additional information that Hottell pleaded guilty to the charge of driving while suspended. Further, that reliability was substantial enough to supply good cause for not producing either the Morgan County arresting officer or prosecutor as live witnesses. Indeed, the reliability of those documents had gone unquestioned by the State, Hottell, and Hottell's counsel until the trial court—rightfully—sought an unconditional admission from Hottell on the issue. That Hottell was unable to give an unconditional admission because of his memory problems did not in itself call into question the established trustworthiness of the Morgan County documents.

In light of the totality of the evidence before the trial court, we must conclude that the Morgan County documents were substantially trustworthy. Hence, there is no error on which Hottell can base his claim of fundamental error. The issue of whether the court abused its discretion in revoking Hottell's probation after considering Skaggs' uncontested hearsay testimony is therefore waived.

Issue Two: Execution of Suspended Sentence

Hottell next asserts that the trial court abused its discretion in ordering him to serve in full his suspended sentence. Specifically, Hottell argues that the court's order is "unreasonable" in light of Hottell's "substantial mitigating evidence." Appellant's Brief at 9, 10. "[T]he standard of review used when reviewing whether a defendant's probation revocation sentence is unreasonable is an abuse of discretion [standard]." Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied.

While Hottell maintains that the mitigating evidence is in his favor, that argument amounts to a request for this court to reweigh the evidence, which we will not do. See Cox, 706 N.E.2d at 551. And, as described in the facts set forth above, the trial court thoroughly considered the facts and circumstances of this case and had ample basis for its decision to order that Hottell serve his entire suspended sentence.[2] See Sanders, 825 N.E.2d at 957-58. We therefore conclude that the court did not abuse its discretion in reaching that decision.

Conclusion

In sum, Hottell has waived his claim of error in the trial court's decision to revoke his probation. While the court's decision was largely based on hearsay evidence, that evidence was substantially trustworthy. Accordingly, because Hottell's trial counsel did not object to the admission of that testimony, Hottell cannot now avoid waiver of that issue by claiming fundamental error. Further, the trial court did not abuse its discretion in ordering Hottell to serve his entire suspended sentence.

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[2] Indiana Code Section 35-38-2-3(g) permits trial courts to revoke a defendant's suspended sentence in its entirety:

> If the court finds that the person has violated a condition [of probation] at any time before termination of the period [of probation], and the petition to revoke is filed within the probationary period, the court may:
>
> (1) continue the person on probation, with or without modifying or enlarging the conditions;
>
> (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
>
> (3) order execution of the sentence that was suspended at the time of initial sentencing.

Affirmed.

SHARPNACK, J., and DARDEN, J., concur.